No. 73-1069

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

JOHNSON MOTOR LINES, INC.,
Appellant,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas

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JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	3
The Agency Proceeding	3
The District Court Proceeding	5
THE QUESTIONS ARE SUBSTANTIAL	7
CONCLUSION	16

CITATIONS

Cases:

American Commercial Lines v. *Louisville & N. R. Co.*, 392 U.S. 571 (1968)	2
Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 (1947)	9
Braswell Motor Freight Lines, Inc., Extension—Atlanta, 100 M.C.C. 482 (1966), *rev. sub nom., Dixie Highway Express, Inc.* v. *United States*, 268 F. Supp. 239 (S.D. Miss. 1967), *rev. sub nom., United States* v. *Dixie Highway Express*, 389 U.S. 409 (1967), I.C.C. *affirmed, Dixie Highway Express, Inc.* v. *United States*, 287 F. Supp. 473 (S.D. Miss. 1968)	11
Campbell Sixty-Six Express, Inc., Extension, 108 M.C.C. 80 (1968)	14
Chicopee Manufacturing Corp. v. *Kendall Company*, 288 F.2d 719 (4th Cir., 1961)	8

CITATIONS—Continued

	Page
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	13
Columbia Shippers and Receivers Ass'n, Inc. v. *United States*, 301 F. Supp. 310 (D. Del. 1969)	13
Consolo v. *Federal Maritime Commission*, 383 U.S. 607 (1966)	15
East Texas Motor Freight Lines, Inc., Extension, 115 M.C.C. 122 (1972)	14
Federal Communications Commission v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955)	13
Illinois Central R.R. Co. v. *Norfolk & Western R. Co.*, 385 U.S. 57 (1966)	13
Spector Freight System, Inc., Extension, 111 M.C.C. 889 (1970)	14
United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944)	8
United States v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967)	2
United States v. *Drum*, 368 U.S. 370 (1962)	8
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964)	8
United States v. *Forness*, 125 F.2d 928 (2d Cir., 1942)	8
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946)	15
Statutes:	
Administrative Procedure Act	
Section 556, 5 U.S.C. § 556	3
Section 557, 5 U.S.C. § 557	3
Section 706, 5 U.S.C. § 706	3, 13
Interstate Commerce Act	
National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, 1001	3, 15
Section 17(4), 49 U.S.C. § 17(4)	3
Section 17(5), 49 U.S.C. § 17(5)	3

CITATIONS—Continued

	Page
Section 207(a), 49 U.S.C. § 307(a)	3, 15
Section 207(b), 49 U.S.C. § 307(b)	3, 15
Judicial Code of the United States	
Section 2284(1), 28 U.S.C. § 2284(1)	3
Section 2284(5), 28 U.S.C. § 2284(5)	3
Miscellaneous:	
80th Annual Report of the Interstate Commerce Commission, 1966	7
81st Annual Report of the Interstate Commerce Commission, 1967	7
86th Annual Report of the Interstate Commerce Commission, 1972	7

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JURISDICTIONAL STATEMENT

Appellant Johnson Motor Lines, Inc. appeals from the judgment of the United States District Court for the Western District of Arkansas, Fort Smith Division, permanently enjoining and setting aside an order of the Interstate Commerce Commission granting appellant's application for a certificate of public convenience and necessity.[1]

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[1] By order entered November 13, 1973, in No. A-475, this Court fixed January 8, 1974, as the date for docketing the appeals of Johnson Motor Lines, Inc., Bowman Transportation, Inc., Red Ball Motor Freight, Inc., and Lorch-Westway Corporation, et al. These appellants are jointly filing the appendix required by Supreme Court Rule 15.

OPINIONS BELOW

The opinions of the District Court are reported at 364 F. Supp. 1239 (Advance Sheets), and are reproduced in the Joint Appendix (JA-J, p. 739 and JA-N, p. 807). The opinion of the Interstate Commerce Commission, Division 1, in *Herrin Transportation Company Extension—Atlanta, Ga.* (retitled McLean Trucking Company Extension—Atlanta, Ga.), 114 M.C.C. 571 (1971), entered December 30, 1971, is reproduced in the Joint Appendix (JA-B, p. 101).

JURISDICTION

The action below was instituted by appellees pursuant to 28 U.S.C. §§ 1336, 2284, and 2321-2325 to set aside orders of the Interstate Commerce Commission entered December 30, 1971, and served January 24, 1972, in a proceeding styled Docket No. MC-1124 (Sub-No. 206), *Herrin Transportation Company Extension—Atlanta, Ga.* (retitled McLean Trucking Company Extension—Atlanta, Ga.). The judgment of the District Court was entered on September 11, 1973, and appellant's notice of appeal was filed in that Court on September 27, 1973. By order entered November 13, 1973, in No. A-475, this Court fixed January 8, 1974, as the date for docketing this appeal.

The jurisdiction of this Court to review the final judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining this Court's jurisdiction on appeal from decisions of three-judge district courts reviewing orders of the Interstate Commerce Commission include *American Commercial Lines* v. *Louisville & N. R. Co.*, 392 U.S. 571 (1968); and *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967).

QUESTIONS PRESENTED

1. Whether in reversing a Commission decision awarding certificates of public convenience and necessity the three-judge District Court abdicated its judicial function by mechanically adopting verbatim proposed findings and conclusions prepared by appellees.

2. Whether in reversing the Commission's decision awarding certificates of public convenience and necessity the District Court employed erroneous standards of judicial review and improperly substituted its judgment for that of the agency.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; Sections 17(4), 17(5), 207(a), and 207(b) of the Interstate Commerce Act, 49 U.S.C. §§ 17(4), 17(5), 307(a), and 307(b); Sections 556, 557, and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 556, 557, and 706; and Sections 2284(1) and 2284(5) of the Judicial Code, 28 U.S.C. §§ 2284(1) and 2284(5), are reproduced in the Joint Appendix (JA-A, p. 93).

STATEMENT

The Agency Proceeding

After eight years of administrative processing the Commission, on September 6, 1972, made final its December 30, 1971, award of certificates of public convenience and necessity to appellants Johnson Motor Lines, Inc., Red Ball Motor Freight, Inc., and Bowman Transportation, Inc. The award to Johnson authorizes the single line carriage of general commodities between points in its existing 16-state system in the New England, Middle Atlantic, Southeast, and Gulf regions, on

the one hand, and, on the other, specified points on proposed routes from New Orleans, La., to Houston, Tex., and from Atlanta, Ga., to Dallas/Fort Worth, Tex. The Red Ball award ties its existing network of routes in ten southwestern states to proposed service at such southeastern cities as Atlanta, Ga., Birmingham, Ala., and Jackson, Miss. The Bowman grant unifies its present system in the eastern regions of the country with proposed service at eight points in Arkansas, two in Kansas, nine in Louisiana, ten in Mississippi, three in Missouri, and 15 in Texas (JA-B, pp. 110-112; 114-116; 116-119).

In the administrative proceeding giving rise to the awards the agency had before it on a consolidated record the certificate applications of ten motor common carriers supported collectively by over 900 shippers and receivers of freight. Testimony in opposition to the ten applications was adduced by 48 protesting carriers.[2] The case was heard by two hearing examiners (now called administrative law judges) who, on November 19, 1969, issued an initial decision finding all of the applicants capable of performing the service proposed, but concluding that there had been a failure to establish that the public convenience and necessity required the granting of the ten applications. Multiple and voluminous exceptions and replies were filed respecting the initial decision. On December 30, 1971, the Commission, Division 1, entered its report and order granting three and denying the remainder of the applications.[3]

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[2] The hearing record consists of over 23,000 transcript pages and almost 2,000 exhibits. In all, over 1,000 witnesses testified during 149 days of oral hearing held in eight cities, over a period of 17 months. The numerous pleadings of the parties are voluminous.

[3] Subsequently, the Commission, upon reconsideration of one of the denials, granted a fourth application, in part. *Jones Truck Lines, Inc., Extension—Atlanta, Ga.*, 117 M.C.C. 586, currently pending on judicial review in *Campbell Sixty-Six Express, Inc., et al.* v. *United States*, Civil Action No. 73-Civ-411-S (W.D. Mo.).

The Commission's approval of the three applications turns fundamentally upon several correlative findings. It finds that the record as a whole shows widespread public dissatisfaction with existing service (principally joint line in nature) from, to, and between the southwest and the southeast, eastern seaboard, and gulf states, as well as a rapidly increasing public demand for additional motor common carriage of a direct, single line nature (JA-B, pp. 147-148). It also finds that the available transportation service between the points and to the extent authority is granted is not reasonably adequate to meet the demonstrated needs of the shipping and receiving public (JA-B, pp. 145-146). Finally, it finds the evidence, considered in its entirety, is convincing that the additional services of three of the ten applicants ". . . will serve a useful public purpose, responsive to a public demand and need" (JA-B, p. 145), and that the gains to be derived by the public from the three new services outweigh any adverse effect the protestants may experience (JA-B, p. 157).

The parties disappointed by the December 30, 1971, decision sought reconsideration and those in favor of it replied. By order served September 6, 1972 (JA-C, p. 363), the Commission, Division 1, acting as an appellate division, denied reconsideration of the Johnson, Red Ball, and Bowman awards, and they became final. On or about September 21, 1972, eleven protestants and one of the unsuccessful applicants filed petitions under the Commission's General Rule of Practice 101(a)(4), 49 C.F.R. § 1100.101(a)(4), requesting the entire Commission to rule and announce that the proceeding involves an issue of general transportation importance. On October 2, 1972, the entire Commission denied those petitions.

The District Court Proceeding

The action in the District Court to annul the Commission's decision was instituted on October 4, 1972, by

nineteen carriers opposed to one or more of the three awards. On October 10, 1972, the three-judge Court was designated to hear and determine the merits of the action. On November 7, 1972, the district judge to whom the application was made issued an order restraining, *pendente lite*, the Commission from implementing the assailed orders. *Arkansas-Best Freight System, Inc., et al.* v. *United States*, 350 F. Supp. 539 (W.D. Ark. 1972).

Briefs on the merits of the action were filed on a staggered schedule during the period February 15-July 16, 1973.[4] Meanwhile, as is customary on judicial review of Commission orders, appellees obtained from the Secretary of the Commission and in May 1973, lodged with the District Court a certified copy of the whole record before the agency. The Appendix hereto sets forth the affidavit of Mr. Robert L. Jones, Jr., a member of the bar of this Court, stating that the boxes containing this agency record do ". . . not appear to have been opened" during the pendency of the judicial review proceeding in the Court below (App., p. A-2).

The District Court did not hear oral argument on the merits of the action. On July 24, 1973, the three judges heard and disposed of certain motions filed by appellees and appellants (JA-E, p. 453). Making plain its belief that oral argument was unnecessary (JA-E, pp. 458, 576), the Court announced that it was taking the case under consideration (JA-E, pp. 567, 582). It also granted appellees' request that the parties submit proposed findings and conclusions (JA-E, pp. 571-572) and these were promptly filed by all parties (JA-F, p. 585; JA-G, p. 615; JA-H, p. 647; JA-I, p. 697).

On September 11, 1973, in an opinion which adopts substantially verbatim the findings of fact and conclu-

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[4] The opening and closing briefs filed jointly by appellees total 293 pages. These documents do not pose specific questions for the Court's resolution.

sions of law proposed by appellees, the District Court sets aside the Commission decision and permanently enjoins the agency from issuing the certificates awarded to appellants, Johnson, Bowman, and Red Ball. The agency's decision is voided primarily on the grounds that it acted irrationally in the weight it accorded evidence and the inferences it drew from facts in the record on some of the issues in the case. Thereafter, the government moved the District Court to amend the judgment of September 11, 1973, by remanding the proceeding to the Commission for further action consistent with the Court's opinion. In a second opinion entered on October 4, 1973, the District Court denied the motion on the grounds that in light of its earlier opinion no useful purpose would be served by a remand (JA-N, p. 807).

THE QUESTIONS ARE SUBSTANTIAL

This case is of major significance to the transport community involved in the motor carriage of freight, including small shipments, between the eastern seaboard and southeast regions and the southwest. Over 900 shippers and receivers testified in the agency proceeding. A number of the carrier participants are included among the largest transportation companies in the country. Indeed, the case was considered by the Commission to be of such importance as to warrant comment in its 80th (1966), 81st (1967), and 86th (1972) Annual Reports to Congress.[5] This widespread interest is justified—for the Commission's proceeding and decision epitomizes the careful exercise of the agency's expert discretion in fulfilling one of the primary objectives of motor carrier regulation, ". . . to assure that shippers generally will be provided a healthy system of motor carriage to which they

[5] 80th Annual Report of the Interstate Commerce Commission, 1966, p. 34; 81st Annual Report of the Interstate Commerce Commission, 1967, p. 32; 86th Annual Report of the Interstate Commerce Commission, 1972, p. 33.

may resort to get their goods to market." *United States* v. *Drum*, 368 U.S. 370 (1962). The intemperate[6] reversal of the Commission's decision by the District Court denies the public the benefits of the transportation found by the Commission to be needed. Moreover, the method employed by the lower Court in preparing the decision and the grounds advanced for reversing the Commission will, unless corrected by this Court, stand as a dangerous precedent undermining well-established standards of judicial review of administrative agency action.

I

There are no decisions of this Court approving the verbatim adoption of proposed findings and conclusions by a District Court of three judges reviewing an order of the Interstate Commerce Commission. A trial judge's mechanical adoption of an opinion prepared by the prevailing party in a district court after a trial *de novo* was viewed with disfavor in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964). If the practice has any justification at all, cf. *United States* v. *Forness*, 125 F. 2d 928, 942 (2d Cir., 1942), *Chicopee Manufacturing Corp.* v. *Kendall Company*, 288 F. 2d 719, 724-725 (4th Cir., 1961), it is that the trial court, having heard the evidence in the first instance, may conserve its time by adopting as its own a statement of that evidence prepared by another. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944).

Here, the three-judge Court had not in the first instance heard the evidence and arguments underlying the agency decision. Rather, it sat as an appellate tribunal to hear and determine the action under established standards of

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[6] The opinion adopted by the District Court immoderately states: "Viewed in its entirety, the Division's report indicates a predilection to grant these particular applications, followed by a strained attempt to marshal findings to support such conclusions" (JA-J, p. 787).

judicial review. *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947). As we emphasize, *infra*, the opinion prepared by appellees and adopted by the District Court *does not* turn on the substantiality of the evidence supporting the Commission's decision. Instead, the opinion voids the agency's action primarily on the grounds that it acted "irrationally" in the weight accorded evidence and the inferences it drew from facts in the administrative record. Wholly apart from the propriety of that standard, the application of it is not a mechanical act. It is a difficult art requiring intimate knowledge of the facts and arguments in the administrative record; the exercise of a high degree of judicial skill and judgment; and the evaluation of many variable factors inherent in the regulation of entry into the field of interstate carriage. The opinion adopted below is devoid of any firm indication that the Court rather than appellees exercised those functions here.

Indeed, there are rather clear indications that the District Court did not adequately verify the correctness of the opinion it adopted. The whole agency record does not appear to have been reviewed by the Court (App., pp. A-1-A-2). The case was submitted for the Court's determination on July 24th; appellees' proposed findings were filed August 14th; and the decision was entered on September 11, 1973. Within this relatively short time span [7] the District Court could not, as a practical matter, have discovered much less unraveled the factual errors in appellees' proposed findings and conclusions. The following examples of some of the more glaring factual errors in the adopted opinion and the insight required in their recognition illustrate the problem:

1. The opinion erroneously charges the Commission with having acted "ex mero motu" in the weight it

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[7] In contrast, the Commission's hearing examiners required over 18 months for the preparation of the initial decision and the case was pending on exceptions before the Commission, Division 1, for about 16 months.

accorded appellees' transit studies (JA-J, pp. 762-763; 778-779). In Johnson's March 24, 1970, exceptions to the initial decision the representativeness of appellees' studies was specifically challenged on the grounds that the time periods occurred subsequent to the notice of the commencement of the hearing (App., p. A-4).

2. Appellants are falsely accused of having failed to challenge the accuracy of the examiners' findings respecting the testimony of the public witnesses (JA-J, pp. 751-758). Johnson's exceptions charged the examiners with having "failed to fairly consider, evaluate, and make essential findings with respect to the public witness testimony" [8] (App., p. A-3).

3. The Commission is unjustly accused of irrationally giving less weight to appellees' transit studies than it accorded transit studies evidenced by appellants (JA-J, pp. 779-780). Neither the Commission nor Johnson relied upon Johnson's transit study as proof of any fact material to the Commission's decision. A detailed explanation of this facet of the case was contained in Johnson's May 10, 1973, brief in the Court below (App., pp. A-6-A-7). Thus, the opinion also erroneously states that ". . . applicants still commend [their transit studies] on brief" (JA-J, p. 780).

4. The Commission is erroneously accused of arbitrarily changing its standards of proof in "rejecting" appellees' transit studies (JA-J, pp. 779-780). First, appellees' studies were not rejected—they were simply found ". . . not [to] present as valid a picture

[8] Appellees did not except to the examiners' findings that applicants are "capable of performing the operations proposed" (Initial Decision, p. 13). Nevertheless, they continued to challenge the feasibility of Johnson's proposed operations in their subsequent pleadings before the agency and on brief in the Court below.

. . ." as the studies evidenced by the shippers (JA-B, p. 129). Second, precisely the same evidentiary standard was applied by the Commission in 1966 in *Braswell Motor Freight Lines, Inc., Extension—Atlanta*, 100 M.C.C. 482.[9]

5. The Commission is unjustly criticized for allegedly failing to discuss the enlargement in the number of carriers certificated during the course of the case to render single line carriage between various points proposed to be served by applicants (JA-J, pp. 782-784). The agency's decision expressly discusses these facts and takes them into consideration in deciding that the public convenience and necessity require still more service (JA-B, p. 106; p. 177 n.6; and text and footnotes at pp. 104-106, 108, 115-116, 130, 157, 173, 180, 321, 324, 326, 333-334, 339, 341, 344, 346, and 354).

6. The opinion erroneously states that the shippers' studies "comprised only a *few* shipments made over a very extensive period of time" (JA-J, p. 761). This phrase is a partial quotation taken out of context from a sentence in the initial decision reading in full: "In other instances [the shippers' studies] comprised only a few shipments made over a very extensive period of time; *and in some instances the bills represented substantially all shipments in a given period between certain points or areas*" (Initial Decision, pp. 10-11; emphasis supplied).

7. The opinion states that the periods of appellees' time studies "conform generally" to the periods covered by the shippers' studies (JA-J, p. 760). This finding is so vague as to defy precise verification of

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[9] Rev. *sub nom., Dixie Highway Express, Inc.* v. *United States*, 268 F. Supp. 239 (S.D. Miss. 1967), rev. *sub nom., United States* v. *Dixie Highway Express*, 389 U.S. 409 (1967), I.C.C. affirmed, *Dixie Highway Express, Inc.* v. *United States*, 287 F. Supp. 473 (S.D. Miss. 1968).

its accuracy.[10] Only one protestant, Campbell Sixty-Six Express (JA-B, pp. 338-339), evidenced a transit study of shipments transported during periods in 1965. Shipper transit studies embracing 1965 shipments include Bostitch-Atlanta, Inc. (JA-B, p. 237); Munroy Company (JA-B, p. 239); Morgan & Lindsay Co. (JA-B, p. 246); Lorch-Westway Corporation (JA-B, p. 287); Utley Carpets & Draperies (JA-B, p. 289); Gibson Products Co. (JA-B, p. 290); Levines, Inc. (JA-B, p. 300); Leff Bros. Dry Goods Co. (JA-B, p. 303); and Sears, Roebuck & Co. (JA-B, p. 306).

Plainly, the recognition of errors of this kind and the ability to correct them presupposes a knowledge the Court below could not, as a practical matter, have independently achieved respecting the mammoth hearing record, the voluminous pleadings, and the lengthy decisions of the examiners and Division 1. Indeed, it is asking too much to assume that the adopted opinion is the product of three disinterested minds. Many of the findings in the opinion respecting "irrational" agency action pivot on comparisons of acts of commission and omission alleged to have occurred at the agency level but which do not appear in the Commission's decision. Assuming, *arguendo*, the correctness of a standard of review permitting comparisons of this kind, the Court below failed properly to perform its judicial function when, without notice to appellants, it mechanically adopted appellees' application of it. In any event, this practice is such a far departure from the accepted and usual course of judicial review proceedings as to warrant the exercise of this Court's power of supervision.

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[10] Over 200 shippers corroborated their oral transit time complaints with transit studies (JA-B, p. 126). Only 14 of the 48 protestants attempted to rebut those complaints with transit studies (JA-B, pp. 321, 326, 329, 332, 334, 336, 338, 339, 341, 342, 344, 347, 348, 349).

II

This Court's intervention in this case is also required to resolve a substantial question respecting the proper scope of judicial review. The test on judicial review of an I.C.C. certificate award is whether the action of the Commission is supported by substantial evidence on the record as a whole. *Illinois Central Railroad Co.* v. *Norfolk & Western R. Co.*, 385 U.S. 57 (1966). The opinion adopted by the Court below does not apply that test. Relying primarily on this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and secondarily upon *Columbia Shippers and Receivers Ass'n, Inc.* v. *United States*, 301 F. Supp. 310 (D.Del. 1969), the opinion prepared by appellees creates a new standard of review.

Under the new test the District Court is called upon to substitute its judgment for that of the Commission whenever the Commission's findings of fact are challenged as "arbitrary and capricious" under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (JA-J, pp. 771-775). As applied below, this new test also relegates the Commission to the role of a reviewing court which must sustain its examiners' findings of fact unless "clearly erroneous" (JA-J, pp. 748-758). This view, of course, has been expressly rejected by this Court in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). Next, the new test imposes upon the reviewing court the duty of independently judging the proper weight to be accorded *different kinds of evidence* in the agency record. For example, the decision below holds "irrational" a difference in evidentiary weight allegedly accorded by the Commission to (a) transit studies evidenced by applicants to establish the feasibility of their proposed operations and (b) transit studies evidenced by protestants to establish the adequacy of their existing service (JA-J, pp. 761-

762). The converse of this holding necessarily compels the Commission in future cases to accord equal weight to transit studies of these kinds. In the same vein, the decision below requires the agency to accord equal weight (a) to evidence of defects in the operations of an applicant for a certificate and (b) to evidence of inadequate service by a protestant to the application (JA-J, pp. 763-764). The Commission has repeatedly rejected this proposition. *Spector Freight System, Inc., Extension,* 111 M.C.C. 889 (1970); *East Texas Motor Freight Lines, Inc., Extension,* 115 M.C.C. 122 (1972). Indeed, one of the appellees was certificated during the course of this case notwithstanding its failure to accept shipments required to be transported by its existing certificates. *Campbell Sixty-Six Express, Inc., Extension,* 108 M.C.C. 80 (1968).

The adopted opinion contains additional indications that its authors viewed the role of the Court as a kind of "super-I.C.C." rather than one judicially reviewing the agency's decision. For example, the agency is unjustly criticized for having permitted the final decision to be made by Division 1 rather than by the entire Commission (JA-J, p. 787). This criticism overlooks that the entire Commission denied appellees' request for full Commission consideration and evidences a lack of understanding that the final decision applies standards and policies long extant in the Commission's regulation of entry. Next, the agency is improperly chastised for having permitted intervenors Lorch-Westway Corporation, et al., "to inject new issues" (JA-J, p. 786). Apart from the fact that this criticism is factually incorrect, it overlooks that intervenors' arguments had no material bearing whatever upon the outcome of the case. Finally, the Court's refusal to remand the case to the Commission (JA-J, pp. 787-788; JA-N, p. 797) flatly interjects the Court into the decisional process placed by Congress exclusively in the hands of the Commission under the Na-

tional Transportation Policy and Sections 207(a) and 207(b) of the Interstate Commerce Act (JA-A, pp. 93-95).

In short, the standard of review adopted below constitutes the court rather than the Commission as the arbiter of the public interest—a function this Court has expressly held inappropriate. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946). This improper result is reached through misplaced reliance on cases *not involving agency fact-finding based on a record* developed in an adjudicatory-type proceeding. If permitted to stand uncorrected, this new standard of review will impose upon three-judge district courts the time-consuming and difficult work of weighing evidence and substituting the judicial judgment for that of the administrative tribunal on the evaluation of the myriad variable factors going into the determination of the present or future public convenience and necessity. The substantial evidence test was adopted deliberately to free the reviewing court of these tasks and aid in the uniform application of the statute. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966). In this case the District Court avoided the complexity inherent in the application of the new standard by simply mechanically accepting appellees' application of it. Thus, the two questions posed in this appeal tend to merge into a single substantial question warranting plenary review by this Court.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. Appellant urges that jurisdiction be noted, that the judgment of the District Court be reversed, and that the case be remanded to that Court with instructions to affirm the Commission.

Respectfully submitted,

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APPENDIX TO JURISDICTIONAL STATEMENT OF JOHNSON MOTOR LINES, INC.

AFFIDAVIT OF ROBERT L. JONES, JR.

STATE OF ARKANSAS)
) ss
COUNTY OF SEBASTIAN)

My name is Robert L. Jones, Jr. I am fifty-one (51) years of age. I have been actively engaged in the private practice of law in the City of Fort Smith, Arkansas, continuously since September of 1948 (with the exception of 21 months in 1950-52 when I served on active duty in the Judge Advocate General Corps of the United States Army). I am admitted to practice before the Arkansas Supreme Court, the United States District Court for the Western District of Arkansas, the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States. I am local counsel in Fort Smith, Arkansas, for Johnson Motor Lines, Inc., Bowman Transportation, Inc., and Lorch-Westway Corporation, et al, intervening shippers in the case in the United States District Court for the Western District of Arkansas, Fort Smith Division, styled "Arkansas-Best Freight System, Inc., et al vs United States of America and Interstate Commerce Commission, et al, No. FS-72-C-65".

On November 12, 1973, at the request of co-counsel for the named clients, I went to the office of the Clerk of the United States District Court, Western District of Arkansas, Fort Smith Division, for the purpose of conferring with the Clerk concerning matters related to the preparation and transmittal of the record to the Supreme Court of the United States in connection with the appeal from the judgment of this Court entered September 11, 1973, and the order of this Court entered October 4, 1973. The Clerk, Honorable E. A. Riddle, specifically requested instructions with reference to transmittal of the record of the proceedings before the Interstate Commerce Commission, which he stated was stored in boxes in the base-

ment of the Federal Building (the Clerk's office is on the third and top floor of the building). I accompanied Mr. Riddle to the basement to a store room which was locked and we gained entrance by a key in the possession of Mr. Riddle. Mr. Riddle pointed out to me four (4) boxes, size approximately two and a half feet in height by two and a half feet in width and two feet in depth, which had been stamped filed on May 23, 1973 on the outside of the boxes by Mr. Riddle's office. Mr. Riddle informed me that the boxes containing the record of the proceedings before the Interstate Commerce Commission, upon receipt by his office, were stored in this store room and to his knowledge had been in the store room continuously since receipt. A more detailed inspection of the boxes revealed that three out of the four large boxes had been opened and each large box contained two or more smaller boxes. These smaller boxes did not appear to have been opened. I instructed Mr. Riddle to have the four larger boxes with content undisturbed crated into one large container and shipped to the Clerk of the Supreme Court of the United States.

Further affiant sayeth not.

/s/ Robert L. Jones, Jr.
ROBERT L. JONES, JR.

Subscribed and sworn to before me, this 16th day of November, 1973.

/s/ Mary E. Burrows
Notary Public

[SEAL]

My Commission Expires:

April 26, 1977.

EXCERPTS FROM MARCH 24, 1970 EXCEPTIONS OF JOHNSON MOTOR LINES, INC. TO THE REPORT AND ORDER RECOMMENDED BY THE HEARING EXAMINERS

In all the circumstances, the examiners failed to fairly consider, evaluate, and make essential findings with respect to the public witness testimony in support of the application of Johnson, a serious applicant. As discussed more fully in Part III hereof, the examiners even more clearly failed to consider, evaluate, and make essential findings as to the effect, if any, of Johnson's proposal on existing carriers. (Exceptions, p. 14.)

* * * *

It is, of course, true that in an effort to rebut the showing of the transit times experienced by the supporting witnesses, a number of the protestants sponsored a series of similar service exhibits designed to show that the transit time provided by them is more expeditious than the transit times depicted in the public witnesses' exhibits. But as pertains to the area involved in the Johnson application, the transit times evidenced by the joint line protestants depicted only a portion of the total services involved in the joint line handling of shipments moving from origins to destinations on the eastern seaboard and the Southwest. Thus, for example, the elaborate transit time studies submitted by ETMF, Gordons, Cole/Dixie, Transcon, and Mercury Freight did not and could not evidence the total transit time provided, for example, on a shipment originating at Dallas, Tex., and terminating at Charlotte, N. C. For, as has been seen, the systems of these carriers end at the gateways of Memphis or Birmingham or Atlanta or New Orleans. There is no evidence in this record by any carrier protesting Johnson of the transit time being performed on joint line shipments, for example, between the Atlanta or Birmingham gateways, on the one hand, and, on the

other, points in the Southeast, Middle Atlantic, and New England states. Moreover, the periods of time covered by the joint line protestants' service exhibits generally occurred subsequent to the notice of the commencement of the hearing herein. Thus, the protestants were aware during the study periods that the results were to be evidenced in this proceeding. Moreover, the through-transit times about which Johnson's supporting shippers and receivers complain and which are reflected in their service exhibits are, on the whole, not directly disputed or explained in the service exhibits sponsored by any carrier protesting the Johnson application on the grounds that its joint line service is reasonably adequate.

The only protesting carriers having significant single line service in the areas presently and proposed to be served by Johnson are Ryder and Roadway, both of which evidenced their transit times in an effort to rebut the transit times complained of by the supporting shippers. As to Ryder, the testimony of the public witnesses shows substantially greater transit times than the Ryder studies —later prepared—would indicate; and, furthermore, Ryder's own standards of service (Johnson Abst. VII, p. 302) generally call for at least one day more of transit time than Johnson is proposing in order to satisfy the numerous requests of the shippers now using Ryder for faster and more consistent transit (e.g., Witness Nos. 64, p. B-1; 88, p. B-1; 460, p. B-2; 629, p. B-2; 538, p. B-5; 404, p. B-81).

The Roadway service study depicted service rendered during a two week period, May 29-June 11, 1966, between Texas, on the one hand, and, on the other, Roadway terminals in 13 eastern states. The period of the study it will be noted occurred more than two months subsequent to the Commission's notice of the commencement of the hearings on March 21, 1966. Moreover, the study was deficient in many respects and it is, accord-

ingly, entitled to little weight. See Johnson Abst. VII, pp. 240-259. In any event, even assuming the validity of the Roadway transit study the fact is that it is but one of the two carriers shown on this record to be available for the single line transportation needed by the shippers supporting the Johnson application between territories where the need for good competitive single line service is clear. (Exceptions, pp. 25-27.) (Footnote omitted.)

EXCERPTS FROM THE MAY 10, 1973 BRIEF OF JOHNSON MOTOR LINES, INC. FILED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION CA NO. FS-72-C-65

Proper Weight and Inferences are Accorded and Drawn From Evidence of the Past Operations of the Applicants on the Question of Whether They Will Perform as Proposed in Their Applications

Plaintiffs argue that the agency paid too little heed to their claim that the applicants will not *prospectively* perform the expedited transport service proposed in their applications (Pltf. Br., pp. 150-157). This is a claim often pressed by protestants to certificate applications and its resolution obviously calls for the exercise of experienced and expert agency judgment. Here, *both* the examiners and the Commission rejected plaintiffs' claim. The examiners specifically found the applicants to be ". . . capable of performing the operations proposed" (RR&O, Sh. 13). The agency considered the question at length and finds the challenge to be without merit. 114 M.C.C. at 611.

The essence of plaintiffs' claim is this—they urged the agency to *infer* the ultimate fact of applicants' future nonperformance from evidence of the *past* operations conducted by the applicants within the regions *presently* served. Declining to draw that inference, the agency stated:

> "Evidence that applicant's transit time for existing services over a shorter distance is more than . . . [the proposed transit time] is not conclusive proof that it will not render . . . [the proposed transit time] between the points proposed. The service and highway conditions between the service points and

routes may be so different that what happens in one case may bear no relation to what will happen in the other." 114 M.C.C. at 611.

In the continued assault on this finding before the Court, it is plaintiffs, not the agency, who ignore the evidence. Witness Sloan evidenced Johnson's past operations as well as its proposed expedited service (X55 and X56). In the course of two days of cross-examination, Mr. Sloan unequivocally testified that Johnson's prospective operations are in no way comparable to its past service—as he put it, ". . . to compare the two [operations] would be like trying to compare apples to oranges" (Tr. 1017). Complementing the testimony of Witness Sloan, Johnson's Witness Henderson proved that current revisions in Johnson's operating practices ". . . will further assure our ability to maintain the proposed operating schedules" (X61, p. 5).

In the face of this overwhelming evidence of Johnson's future ability, the Commission quite properly *declined* to draw the inference protestants claim should have been extracted from one exhibit. Furthermore, there is abundant precedent for this kind of agency action—it having reached the same result on the same issue in, among other cases, *West Brothers, Inc., Extension—Baton Rouge, La.*, 106 M.C.C. 792 (1968), and *Transamerican Freight Lines, Inc., Extension—Columbus, Ga.*, 115 M.C.C. 416 (1972). (Brief, pp. 40-41.) (Footnote omitted.)

CERTIFICATE OF SERVICE

I, Donald E. Cross, counsel for appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 8th day of January, 1974, I served copies of the foregoing document on the parties hereto, postage prepaid by first class or air mail, as follows:

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1069

JOHNSON MOTOR LINES, INC.,
Appellant,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM

I

Relying primarily upon *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), appellees move to dismiss the appeal as premature. *Crescent* is inapposite. There, the time for appeal was tolled by a motion to amend *substantive findings* in the judgment. Here, the Commission's September 14th motion expressly sought a

change in the "form" of the September 11th judgment (J.A. p. 795). In its October 4th memorandum denying relief the District Court points out that the motion ". . . does not contest the court's [September 11th] ruling that the [I.C.C.] orders are invalid. . . ." (J.A. p. 822). As the September 11th judgment of the District Court finally settled the substantive questions in controversy in this Court, appellant's September 27th notice of appeal was timely. *Federal Trade Commission* v. *Minneapolis Honeywell R. Co.*, 344 U.S. 206 (1952). Indeed, the September 11th judgment was recognized as a final adjudication of the merits of the case by all appellants when they filed notices of appeal within 60 days thereafter (J.A. p. 837). Had the appeals been filed within 60 days of the October 4th order denying the Commission's motion, but more than 60 days after the September 11th judgment, the only question before this Court might well be whether the District Court appropriately declined to remand. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

Song Jook Suh v. *Rosenberg*, 437 F. 2d 1098 (9th Cir., 1971) provides an alternative answer to the motion to dismiss. There, as here, the appeal was taken during the pendency of a post-judgment motion. There, as here, the motion was denied. Holding the appeal good, the Ninth Circuit reasoned that the notice of appeal, which expressly referred to the first judgment, ". . . became effective when the judgment became final." 437 F. 2d at 1101. Thus, assuming the Commission's September 14th motion delayed the finality of the September 11th judgment, Johnson's September 27th notice of appeal, which expressly referred to the judgment, remained on file and became effective when the judgment became final.

Finally, appellees do not challenge the timeliness of the appeal of Lorch-Westway Corporation, et al. (Lorch), in No. 73-1071. Lorch intervened in the agency proceeding

in support of Johnson's certificate application and in the District Court in support of the Commission's order granting it. Should appellees' motion to dismiss this appeal be granted, Johnson requests that its Jurisdictional Statement and this Brief in Opposition to Motion to Dismiss and Affirm be considered by the Court in support of the appeal in No. 73-1071.

II

On the merits of the appeal, appellees isolate various facets of the questions presented and argue that no one of them, standing alone, warrants this Court's consideration. But, as pointed out in the Jurisdictional Statement, the method employed in the lower court's consideration and determination of the case and the scope of review utilized in reaching its judgment, *viewed collectively*, ". . . tend to merge into a single substantial question warranting plenary review by this Court" (J.S. p. 15).

Finally, the factual errors in the District Court's opinion, outlined in the Jurisdictional Statement (J.S. pp. 9-12), are not denied by appellees. Significantly, most of those errors turn on material contained in pleadings filed *subsequent* to the agency hearing. These pleadings constitute a part of the record before the agency [5 U.S.C. § 556(e)] and are therefore a part of the record certified by the I.C.C. to the District Court. However, these pleadings are *not* summarized in the abstracts of testimony and exhibits appellees commend as a substitute for the agency record the District Court must review in reaching its determination under 5 U.S.C. § 706. Thus, assuming, *arguendo*, that abstracts of testimony and exhibits before the agency were properly relied upon below,

those documents do not contain portions of the administrative record relevant and material to the decision here challenged.

Respectfully submitted,

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see 73-1055,
1070, 1071, 1072